



File No. 13 CVS 01261

STATE OF NORTH CAROLINA, *ex rel.*)
 ROY COOPER, ATTORNEY GENERAL,)
 Plaintiff,)

V.

WARE INVESTMENTS, LLC and)
JAMES WARE KELLEY, III, individually)
and in his capacity as sole owner and)
managing member of WARE)
INVESTMENTS, LLC,)
)
)
Defendants.)

**ENTRY OF JUDGMENT AND
PERMANENT INJUNCTION
AGAINST DEFENDANT
JAMES WARE KELLEY, III**

THIS MATTER came on for hearing before the undersigned Judge presiding over the April 6, 2015 civil session of Orange County Superior Court upon plaintiff State of North Carolina's Motion for Entry of Default Judgment against the individual defendant herein, James Ware Kelley, III. Special Deputy Attorney General David N. Kirkman appeared for plaintiff State of North Carolina. No one appeared on behalf of either defendant despite their being duly notified of the proceeding on March 11, 2015. Defendant Kelley on April 2, 2015 emailed the Trial Court Administrator a request to continue today's hearing, which request this Court has denied. The Court has reviewed the record in this cause, including the July 28, 2014 Order of The Honorable Carl R. Fox entering defendant Kelley's default and striking his Answer for violating earlier orders pertaining to discovery. Judge Fox's Order held that the allegations in plaintiff's Complaint were deemed established for purposes of this litigation. Based upon the foregoing, the Court hereby finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiff State of North Carolina filed this deceptive trade practices action against

defendants on July 22, 2013, alleging, *inter alia*, that defendants regularly, routinely and for over ten years collected security deposits from their incoming residential tenants in Chapel Hill and Durham, North Carolina and failed to protect or return those deposits as mandated by state statutes.

2. Defendants were duly served with copies of the Civil Summons and the Complaint herein by the Orange County Sheriff on July 24, 2013. Defendant Ware Investments, LLC filed no Answer or responsive pleading. Defendant Kelley filed an Answer on September 20, 2013 denying the allegations in plaintiff's Complaint
3. Until the early months of 2013, when the North Carolina Attorney General began investigating their tenant security deposit practices, defendants did not place and maintain their North Carolina residential tenants' security deposit funds in a special trust account with a North Carolina financial institution. Instead, they co-mingled those deposits with their regular business and personal funds in violation of the North Carolina Tenant Security Deposit Act, N.C. Gen. Stat. § 42-50, *et seq.*
4. The First Citizens Bank business account into which defendant Kelley routinely deposited his North Carolina residential tenants' security deposits was levied upon successfully by a third party creditor of defendants during the year preceding the initiation of this action.
5. From at least January 1, 2007 to the present, defendants have owned approximately twelve residential rental properties in North Carolina, two in Durham and ten in Chapel Hill. They are duplex or triplex housing units. Most of the tenants in defendants' Chapel Hill rental properties have been university students. Defendants routinely have rented these properties to tenants in one-year increments beginning on August 1 and ending on July 31. In addition, prior to the beginning of each tenancy, they routinely have collected from their tenants a security deposit equal to one month's rent.
6. Defendants regularly and routinely failed to return their North Carolina residential

tenants' security deposits upon the conclusions of their tenancies.

7. When challenged by tenants over their retention of these deposits, defendants routinely responded with contrived or unsubstantiated claims that the tenants had left the premises in a damaged state or owed bills that were not the tenants' responsibilities, and that defendants therefore were entitled to keep the deposits. In most of these instances, the alleged damage either pre-existed the tenancies, was actually normal wear and tear, or did not even exist.
8. Defendants routinely attempted to thwart tenants' legal actions for recovery of their deposits by appealing judgments entered in favor of those tenants in Orange or Durham County Small Claims Court or in Orange and Durham County District Court. Often defendant would contest the judgments entered against him and his company even though he did not appear at trial. As shown by the affidavit of Attorney David Crescenzo of UNC Student Legal Services, in at least one case, defendant Kelley, acting *pro se*, gave notice of appeal to the North Carolina Court of Appeals after suffering a judgment in Orange County District Court but he never perfected the appeal.
9. The aforementioned acts, practices and omissions by defendants began more than ten years prior to the filing of this action. Defendants' practice of improperly retaining security deposits persisted beyond its filing.
10. Defendant Kelley further attempted to thwart tenants' recovery of their security deposits by filing for bankruptcy protection in the Eastern District of North Carolina in 2011. That bankruptcy action was dismissed a year later due to defendant Kelley's failure to abide by court rules. Defendant Kelley subsequently filed for Chapter 11 Bankruptcy protection as an individual in November, 2013 and continued his North Carolina rental practices as a debtor in possession. That case was filed in the United States District Court for the District of Colorado under case number 13-28933 HRT. Plaintiff continued on with this

state enforcement action pursuant to § 362(b)(4) of the United States Bankruptcy Code (exceptions to bankruptcy stay for government units enforcing their police and regulatory powers) after notifying defendant Kelley and the U.S. Bankruptcy Trustee assigned to that case in December 2013.

11. This Court entered a Preliminary Injunction against defendants on April 9, 2014 prohibiting them from collecting tenant security deposits from North Carolina residential tenants and from failing to handle and return existing deposits in accordance with requirements of the Tenant Security Deposit Act, N.C. Gen. Stat. § 42-50, *et seq.*
12. In discovery, defendant Kelly never provided plaintiff with requested records that would establish the identities of all his North Carolina residential tenants, the amounts of the security deposit each one paid him, or the amounts of those deposits, if any, that he returned. This is so even though the Court ordered defendant Kelly to produce such records on April 9, 2014 and again on July 28, 2014.
13. The corporate defendant, Ware Investments, LLC never filed an Answer or other responsive pleading in this action, nor did a North Carolina attorney ever make an appearance on its behalf. Ware Investments, LLC was administratively dissolved by the North Carolina Secretary of State in 2012. At all times relevant to this action, defendant Kelley was the sole owner of the corporate defendant and managed and controlled its operations.
14. From the record in this cause, including the deposition transcripts, affidavits, and the now uncontested allegations in plaintiff's Complaint and its Motion for Preliminary Injunction, defendant Kelley failed to return \$14,935 in security deposits to the following individuals after they rented Durham or Chapel Hill residential rental properties from him:

Anthony Beard	\$550.00
Ryland Jones	\$550.00
Erin Hawley	\$1,410.00
Kenan Eiler	\$350.00
Angie Neri	\$350.00
Katie Lalonde	\$350.00
Rebecca Martin	\$525.00
Daniel Keller	\$525.00
Joanna Cutrara	\$500.00
Catherine Stotts	\$500.00
Ryland Oakes Jones	\$550.00
Anthony Beard	\$550.00
Danielle Cristina Istock	\$450.00
Meredith M. Nichter	\$450.00
Matthew Delefield	\$1,400.00
Elizabeth Holz	\$500.00
Hannah Watts	\$500.00
Matthew Grosso	\$450.00
Alex Zlotnik	\$450.00
Harsh Joshi	\$450.00
Barbara Burke	\$412.50
Pierce Pandolph	\$412.50
Roy Stone	\$950.00
Stephanie MacDonald	\$450.00
Sara Torti	\$450.00

Molly Caroline Bergeson \$450.00

Amanda M. Johnson \$450.00

15. Other North Carolina tenants likely had their security deposits wrongfully withheld by defendant Kelley, but their identities are unknown due to defendant Kelley's failures to provide information on them in response to discovery and repeated orders of the Court.
16. During the four years preceding the filing of this action, defendants improperly failed to place the security deposits of at least forty-eight of their North Carolina residential tenants in a designated trust account with a North Carolina financial institution at the beginning of their tenancies, as required by N.C. Gen. § 42-50.
17. By means of written interrogatories served upon him in November 2008 by the plaintiffs in the Orange County Civil District Court case Daniel Keller and Rebecca Martin v. James Kelley, file number 08 CVD 1458, defendant Kelley was asked about and objected to identifying the trust account into which had deposited the plaintiffs' residential tenant security deposit.
18. Defendants' acts, practices and omissions set forth above have been in and effecting commerce in North Carolina and have had a substantial and negative impact thereon.
19. The acts, practices and omissions set forth above were committed knowingly, willfully and regularly by defendant Kelley and his company defendant Ware Investments, LLC.
20. Defendant Kelley has made no effort to resolve this matter despite its obvious seriousness.
21. As the owner of approximately a dozen rental properties in the Durham-Chapel Hill area, defendant Kelley is a person of substantial assets.
22. Plaintiff's counsel has filed an affidavit with the Court stating that he has devoted more than 80 hours to the investigation and prosecution of this civil action. His affidavit states further that he has been licensed to practice before the courts of North Carolina since

August, 1979 and that he has been an enforcement attorney in the North Carolina Department of Justice's Consumer Protection Division since 1987. Plaintiff's counsel is known to the Court for his expertise in prosecuting Unfair and Deceptive Trade Practices cases under Chapter 75 of the North Carolina General Statutes. In his affidavit, plaintiff's counsel states that for the past twenty years the courts of North Carolina routinely have reimbursed plaintiff under N.C. Gen. Stat. § 75-16.1 for his attorney services in successful enforcement actions at the hourly rate of \$150.00. The Court finds that the amount of time plaintiff's counsel has devoted to this action so far and an hourly compensation rate of \$150 are both reasonable and appropriate.

CONCLUSIONS OF LAW

1. The Court has both personal jurisdiction over the defendants and subject matter jurisdiction in this cause.
2. Defendant Kelley regularly and repeatedly has violated the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.*, by failing to refund to the twenty-four individuals listed above, and most likely several others, their residential tenant security deposits and by failing to properly account for the handling of those deposits.
3. Defendant Kelley regularly and repeatedly violated the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.*, by failing on at least 48 occasions to place and hold his North Carolina residential tenants' security deposits in a designated trust account with a North Carolina financial institution, as required by N.C. Gen. Stat. § 42-50. These violations occurred during annual rental cycles beginning in August 2009, August 2010, August 2011 and August 2012. There very likely were far more than 48 violations during this time period due to the fact that defendant Kelley often collected separate security deposits from each resident or roommate in an individual rental unit.
4. Plaintiff is entitled to judgment against defendant Kelley on its Unfair and Deceptive

Trade Practices claim, which judgment shall include: 1) a permanent injunction under N.C. Gen. Stat. § 75-14 similar to the Court's Preliminary Injunction entered on April 9, 2014; 2) restitution for victims under N.C. Gen. Stat. § 75-15.1; 3) civil penalties under N.C. Gen. Stat. § 75-15.2 for wrongfully withholding refunds of residential tenant security deposits; 4) civil penalties under N.C. Gen. Stat. § 75-15.2 for failing to promptly deposit and maintain those tenant security deposits in a trust account with a North Carolina financial institution; and 5) an award of attorneys fees under N.C. Gen. Stat. § 75-16.1.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered against defendant James Ware Kelley, III and in favor of Plaintiff State of North Carolina for violating the Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1.

Monetary Judgment for Restitution to Tenants - \$ 14,935.00

IT IS FURTHER ORDERED ADJUDGED AND DECREED, pursuant to N.C. Gen. Stat. § 75-15.1, that plaintiff recover from defendant Kelley, for the benefit of the twenty-four individuals listed in Finding of Fact 14, above, the sum of Fourteen Thousand, Nine Hundred and Thirty-Five dollars (\$14,935.00) as restitution for the improper retention of their tenant security deposit funds. Plaintiff shall apply the proceeds of any recovery under this Judgment towards this restitution award first. If the amounts recovered are insufficient to cover the entire restitution award, plaintiff shall disburse the proceeds to the above named individuals in *pro rata* shares, then disburse subsequently obtained funds in the same manner. Only after the restitution award has been collected and fully disbursed to the above listed individuals may plaintiff apply proceeds recovered from defendant Kelley to other aspects of this Judgment.

Monetary Judgment for Civil Penalties - \$ 96,000

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, pursuant to N.C. Gen. Stat. § 75-15.2, that plaintiff recover from defendant James Ware Kelley, III the sum of

\$ 96,000.00 as civil penalties. Of this sum, defendant Kelley is liable for penalties of \$48,000, or \$ 2,000 for each of the twenty-four violations of N.C. Gen. Stat. § 75-1.1 involving failures to refund the deposits of the twenty-four former tenants listed above. Defendant Kelley is also liable to plaintiff for additional civil penalties of \$ 48,000, or \$ 1000.00 for each of the 48 times, at a minimum, that he failed to deposit tenants' security deposit funds promptly into a designated trust account with a North Carolina financial institution during annual rental cycles beginning in August of 2009, 2010, 2011 and 2012.

**Permanent Injunction Against Collecting Security Deposits
from North Carolina Residential Tenants**

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant James Ware Kelley, III, together with his agents, employees and representatives, and any corporation or other business entity which he controls, manages or has a majority ownership in, are hereby permanently enjoined and prohibited from soliciting, requesting, collecting, accepting or otherwise obtaining a security deposit from any tenant or prospective tenant leasing, applying to lease or seeking to lease residential rental property located in North Carolina. Defendant Kelley shall hold and disburse any North Carolina tenants' deposits collected prior to the Court's April 9, 2014 Preliminary Injunction prohibiting his collection of security deposits in accordance with the procedures and requirements of the North Carolina Tenant Security Deposit Act and any procedures, requirements and directives of the United States Bankruptcy Court for the District of Colorado in case number 13-28933 HRT (Chapter 7).

Award of Attorneys' Fees in the Amount of \$12,000.00, Plus Other Costs

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs and attorneys fees are hereby taxed to defendant Kelley. In addition to all other costs that might be determined by the Clerk, the Court hereby awards attorneys fees to plaintiff State of North Carolina in the amount of \$12,000.00 pursuant to N.C. Gen. Stat. § 75-16.1.

Retention of Jurisdiction

*but not necessarily
the undersigned*

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court retains jurisdiction in this matter to ensure compliance with all injunctions entered herein and for the disposition of any remaining claims against the now-dissolved corporate defendant.

This the 6th day of April, 2015.



SUPERIOR COURT JUDGE